(3)

No. 03-1313

In the Supreme Court of the United States

SYLVIA DAVIS, AS GUARDIAN AND NEXT FRIEND FOR DONNELL E. DAVIS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly concluded that the district court did not abuse its discretion in determining that the Seminole Nation of Oklahoma (the Tribe) is an indispensable party to a claim challenging eligibility requirements prescribed by the Tribe for benefits administered by the Tribe.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 343 F.3d 1282. An earlier opinion of the court of appeals (Pet. App. 56a-75a) is reported at 192 F.3d 951. The opinion of the district court (Pet. App. 25a-55a) is reported at 199 F. Supp. 2d 1164. An earlier opinion of the district court (Pet. App. 76a-88a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 10, 2003. A petition for rehearing was denied on December 16, 2003 (Pet. App. 89a-90a). The petition for a writ of certiorari was filed on March 15, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, two bands of the Seminole Nation of Oklahoma and an individual, filed this suit against the United States (and Department of Interior officials) to obtain the benefits of certain programs established and administered by the Seminole Nation of Oklahoma (the Tribe or the Seminole Nation) through tribal ordinances. Petitioners did not sue the Seminole Nation. The district court found that the Seminole Nation is an indispensable party and granted summary judgment to respondents. Pet. App. 25a-55a. The court of appeals affirmed. *Id.* at 1a-24a.

1. a. In August 1950 and July 1951, the Seminole Nation of Oklahoma and the Seminole Indians of Florida filed separate claims with the Indian Claims Commission (ICC) seeking compensation for tribal lands in Florida that were ceded to the United States in the Treaties of Camp Moultrie (1823) and Payne's Landing (1832). *Seminole Indians* v. *United States*, 38 Ind. Cl. C. 62, 63 (1976). The claims were tried as a consolidated case. *Ibid.* In April 1976, the ICC approved the parties' "proposed compromise settlement" and entered a final judgment of $16 million in favor of the Seminole Indians of Florida and the Seminole Nation of Oklahoma "on behalf of the Seminole Nation as it existed in Florida on September 18, 1823." *Id.* at 90; see Pet. App. 30a. With interest, the amount of the award was approximately $56 million. *Ibid.*

The Distribution of Judgment Act, 25 U.S.C. 1401 *et seq.*, sets forth general guidelines for judgment funds awarded by the ICC or the United States Court of Federal Claims. 25 U.S.C. 1402; Pet. App. 94a-95a. The Act requires the Secretary of the Interior (the Secretary) to prepare and submit to Congress a plan for the

use and distribution of monies appropriated for judgment funds. *Ibid.* In June 1976, pursuant to the ICC judgment in favor of the Seminole Nation of Oklahoma and the Seminole Indians of Florida, Congress appropriated Judgment Fund monies in the amount of $16 million plus interest to the Seminole Nation. Act of June 1, 1976, Pub. L. No. 94-303, Tit. I, Ch. XII, 90 Stat. 629; Pet. App. 81a. From 1977 to 1990, however, no final use and distribution plan was enacted or became operative. *Id.* at 33a n.3.

In April 1990, Congress enacted the Indian Claims Distribution of Funds to Seminole Indians Act (the 1990 Distribution Act), which superseded the 1973 Distribution of Judgment Act with respect to the Seminole Nation Judgment Fund. Pub. L. No. 101-277, § 1, 104 Stat. 143. The 1990 Distribution Act allocated the previously appropriated Judgment Fund monies among the Florida and Oklahoma tribes. It also granted the Oklahoma Tribe the authority to propose a general plan for the use and distribution of the Tribe's Judgment Fund. § 3, 104 Stat. 143. Congress authorized "the governing body of the Seminole Nation of Oklahoma[,] in consultation with the Secretary of the Interior," to prepare a "plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma." *Ibid.* The 1990 Distribution Act further provides that "[a]ny plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine." § 4(a), 104 Stat. 143; Pet. App. 92a-93a.

b. The 1990 Distribution Act does not prescribe or address eligibility requirements for participation in

programs funded by the Judgment Fund. In accordance with Section 3(a) of the 1990 Distribution Act, 104 Stat. 143, the Seminole Nation developed the "1991 Usage Plan" (the Plan). As required by Section 3(a) of the 1990 Distribution Act, the Secretary submitted the Plan to Congress on January 30, 1991, with a recommendation that it be approved. 56 Fed. Reg. 32,480 (1991); Pet. App. 36a. The Plan became effective 60 days later, as provided by Section 4(d) of the 1990 Distribution Act, 104 Stat. 144. Pet. App. 36a; C.A. Supp. App. SA065, SA161-SA162.

The 1991 Usage Plan is a general plan for the use and distribution of the Tribe's Judgment Fund and provides that the Judgment Fund "shall be available for use by the tribal governing body on a budgetary basis for programs and services established in accordance with priorities determined by the tribal governing body." 56 Fed. Reg. at 32,480. The role of the Bureau of Indian Affairs (BIA) with respect to the programs is limited to releasing funds from the Tribe's Judgment Fund Account for the Tribe's use under the Plan as long as the planned expenditures are in accordance with the 1990 Distribution Act and the Plan. C.A. Supp. App. SA065.

The Tribe has established and implemented Judgment Fund programs and services through tribal ordinances. Pet. App. 61a, 68a; C.A. Supp. App. SA077-SA079. As provided in those ordinances, the Tribe receives and processes applications for participation in Judgment Fund programs. The Tribe determines the eligibility requirements for participation in each program. Many Judgment Fund Programs require, consistent with the terms of the ICC's award, see Pet. App. 30a, that an eligible program applicant "be an enrolled member of the Seminole Nation of Oklahoma

who has been determined to have descended from a member of the Seminole Nation as it existed in Florida on September 18, 1823" (the eligibility requirement). Pet. App. 7a, 61a.[1]

c. Petitioners Dosar-Barkus Band and Bruner Band are two of the fourteen separate bands of the Seminole Nation. Following the United States Civil War, the Seminole Nation and the United States entered into the Treaty of March 21, 1866. Art. I, 14 Stat. 755; Pet. App. 91a. The treaty provided that slavery was not to exist among the Seminoles, and stated that persons of African descent among the Seminoles (who were sometimes referred to as the Estelusti) were to "have and enjoy all the rights of native citizens, and the laws of [the Seminole] nation [were to] be equally binding upon all persons of whatever race or color," who may be accepted as citizens or members of said tribe. *Ibid.*

Thereafter, tribal members of African descent organized into two "Freedmen" bands—the Dosar-Barkus Band and the Bruner Band. Pet. App. 2a-4a. Because the members of those bands were not recognized members of the Tribe until the Treaty of 1866, the Tribe has not allowed them to participate in those Judgment Fund programs established by the Tribe that condition participation on descent from a member of the Tribe "as it existed in Florida on September 18, 1823." *Id.* at 7a, 61a.

2. Petitioners brought suit challenging their exclusion from Judgment Fund programs under the 1823 eligibility requirement, contending that the requirement violates the 1990 Distribution Act. Pet. App. 2a,

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[1] At least one Judgment Fund program, the Culture and Recreation Enhancement Assistance Program, does not include that requirement. C.A. Supp. App. SA163-SA167.

8a, 62a-63a.[2] Respondents sought dismissal on several grounds, including failure to join the Tribe as an indispensable party under Federal Rule of Civil Procedure 19. *Id.* at 87a.

a. The district court dismissed the claim, ruling that, under *Fletcher* v. *United States*, 116 F.3d 1315 (10th Cir. 1997), "the Seminole Nation of Oklahoma is an indispensable party that cannot be joined on account of sovereign immunity." Pet. App. 87a.

b. The court of appeals reversed and remanded. Pet. App. 56a-75a. The court agreed with the district court that the Tribe is a necessary party under Rule 19(a). *Id.* at 65a-69a. The court of appeals disagreed, however, with the district court's conclusion that *Fletcher* conclusively resolved the Tribe's "indispensability" for purposes of Rule 19(b). *Id.* at 69a-73a. The court therefore "remand[ed] to the district court to conduct an analysis of all the factors articulated in Rule 19(b) and make a reviewable determination as to whether the Tribe is an indispensable party." *Id.* at 73a.

c. On remand, the district court granted respondents summary judgment, again ruling that the Tribe is an indispensable party. Pet. App. 25a-55a. The court considered and weighed each of the factors set forth in Rule 19(b) in reaching that conclusion. *Id.* at 44a-50a.

With respect to the extent to which a judgment rendered without the Tribe's presence could be prejudicial to the Tribe, the court explained that a judg-

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[2] In addition to their claim concerning the Judgment Fund, petitioners also challenged the refusal of the BIA to issue them "Certificates of Degree of Indian Blood." See Pet. App. 63a. The district court dismissed that claim based on a failure to exhaust administrative remedies, *id.* at 50a-54a, and the court of appeals affirmed that ruling, *id.* at 20a-24a. Petitioners do not seek this Court's review of those rulings.

ment for petitioners requiring the Tribe to provide them Judgment Fund benefits "would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs." Pet. App. 47a. Next, the court explained that "there is no way to shape relief that would lessen or avoid the prejudice to the absent Tribe," *ibid.*, and that there was a "very real possibility that [respondents] would incur a substantial risk of inconsistent legal obligations if the BIA officials were subsequently sued by the Seminole Nation for actions taken in violation of tribal law," *id.* at 48a. The court further found that a judgment in favor of petitioners "would not necessarily afford complete relief because" it "will not have a binding effect on the absent Tribe" or "on the manner in which the Tribe runs its tribal programs." *Ibid.* Finally, the court held that, while respondents have no alternative forum in which their claim can be heard, that consideration was outweighed by the other factors. *Id.* at 49a-50a. The court therefore concluded that "the prejudice to the absent Tribe, the Court's inability to lessen the prejudice and the absence of an adequate remedy without the Tribe's joinder prevent proceeding in equity and good conscience." *Ibid.*

d. The court of appeals affirmed, holding that the district court had not abused its discretion in ruling that the Tribe was an indispensable party. Pet. App. 1a-24a. The court agreed with the district court's analysis of each of the Rule 19(b) factors.

The court first agreed with the district court's conclusion that there could be prejudice to the Tribe if the case were to proceed in the Tribe's absence. Pet. App. 13a-16a. The court rejected petitioners' argument that the Tribe's interest is legally frivolous because it is an

"interest in excluding the Estelusti from the Judgment Fund." *Id.* at 13a. The court explained that, whereas Rule 19 is concerned with prejudice to "*claimed* interest[s]," Fed. R. Civ. P. 19(a) (emphasis added), petitioners' argument "amount[ed] to asking [the court] to decide that the Tribe's 'interest' is not worthy of consideration because its position is wrong on the merits." *Ibid.*

With respect to whether the prejudice to the absent party could be lessened or avoided, petitioners relied solely on their contention that the prejudice to the Tribe was legally irrelevant because, in their view, the Tribe had no lawful interest in excluding them from programs supported by the Judgment Fund. Pet. App. 16a. The court of appeals rejected that argument based on the court's determination that the Tribe's interests could be prejudiced. *Ibid.*

The court of appeals also agreed with the district court's conclusion that a judgment entered in the Tribe's absence would be inadequate for Rule 19 purposes. Pet. App. 16a-17a. The court explained that, while petitioners argued that a judgment would afford them complete relief, that argument "miscontrue[d] the nature of the adequacy inquiry." *Id.* at 16a. The question is not whether the judgment would be adequate "from the plaintiff's point of view," but whether it would be adequate from the perspective of the public interest in "complete, consistent, and efficient settlement of controversies." *Id.* at 17a (quoting *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102, 111 (1968)). Here, the court concluded, "a judgment rendered in the Tribe's absence could well lead to further litigation and possible inconsistent judgments." *Ibid.*

Finally, the court of appeals explained that "the plaintiff's inability to obtain relief in an alternative forum is not as weighty a factor when the source of that inability is a public policy that immunizes the absent person from suit." Pet. App. 18a. Thus, the court held that, "[w]hen viewed in light of the Tribe's sovereign immunity and the first three Rule 19(b) factors, we do not believe that the absence of an alternative forum weighs so heavily against dismissal that the district court abused its discretion." *Id.* at 19a.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. This Court's review therefore is not warranted.

1. Petitioners contend (Pet. 10-16) that the court of appeals' decision conflicts with this Court's decision in *Provident Tradesmens Bank & Trust Co.* v. *Patterson*, 390 U.S. 102 (1968). That argument lacks merit.

Provident explained that "Rule 19(b) suggests four 'interests' that must be examined in each case to determine whether, in equity and good conscience, the court should proceed without a party whose absence from the litigation is compelled." 390 U.S. at 109. In *Provident*, the court of appeals' decision reversed by this Court had completely disregarded Rule 19 in determining that the litigation should not have gone forward without the absent party. *Id.* at 106-107, 116, 128. Here, by contrast, both the district court and court of appeals considered each of the Rule 19 interests identified in *Provident* and determined that, in equity and good conscience, the case should not go forward without the Tribe, and that the Tribe could not be

joined because of its sovereign immunity. Pet. App. 11a-20a, 44a-50a.

Petitioners nonetheless maintain that the court of appeals' analysis is inconsistent with *Provident* because the court "turn[ed] a blind eye" to what is at stake for the Tribe and "failed even to identify the supposed interest of the Tribe, let alone to consider whether that interest 'really exists.'" Pet. 11, 12. That is incorrect. In its first opinion, in holding that the Tribe is a necessary party under Rule 19(a), the court of appeals explained that the "Tribe has determined the eligibility criteria for participation in [Judgment Fund] programs and has adopted ordinances containing the Eligibility Requirement." Pet. App. 68a. As a result, the court reasoned, a "ruling on the merits in favor of [petitioners] on their Judgment Fund Award claim will have the practical effect of modifying the Tribal ordinances containing the Eligibility Requirement. Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements." *Ibid.* The court further explained that the "Tribe's claimed interest in determining eligibility requirements and adopting ordinances embodying those requirements is neither fabricated nor frivolous. The disposition of [petitioners'] Judgment Fund Award claim in the Tribe's absence will impair or impede the Tribe's ability to protect its claimed interest." *Ibid.*

On remand, the district court found that "[a] favorable judgment for [petitioners] on their judgment fund award claim would, in effect, reverse the decisions of the Tribe's governing body, and significantly interfere with the Tribe's ability to govern its programs. Essentially, the Court would be defining who is eligible for participating in tribal programs." Pet. App. 47a. The court of appeals affirmed that conclusion, ruling that

the district court had not abused its discretion in holding that the Tribe would be prejudiced by a judgment in its absence. *Id.* at 16a. Indeed, because petitioners seek as relief that the Tribe be required to provide them Judgment Fund benefits, their claim not only seeks invalidation of the eligibility requirement contained in the Tribe's ordinances, but also effectively seeks establishment of new eligibility requirements for access to tribal programs supported by the Tribe's Judgment Fund.

Petitioners contend (Pet. 13-14) that the court of appeals was required to assess the ultimate merits of the Tribe's interest, arguing that the court's approach conflicts with this Court's suggestion in *Provident* that Rule 19's purpose is to achieve justice between all the parties in interest. See 390 U.S. at 116-117 n.2. Petitioners misread *Provident*. The Court's decision in *Provident* does not suggest that a court must assess the ultimate merits of the absent party's legal position in determining under Rule 19(b) whether the party is indispensable. As the court of appeals correctly explained, the "underlying merits of the litigation are irrelevant to a Rule 19 inquiry, at least unless the claimed interest is patently frivolous." Pet. App. 13a (internal quotation marks and citations omitted). The court's analysis is fully consistent with *Provident*, which held that the relevant inquiry is whether a judgment would harm or prejudice the absent party. 390 U.S. at 114-115. Although the *Provident* Court ultimately concluded that the absent party was not harmed or prejudiced by the adverse judgment in the particular

circumstances of that case,[3] here, the district court and court of appeals correctly concluded that a judgment in this case would harm and prejudice the absent Tribe.[4]

The court of appeals' decision also is consistent with the decisions of other courts of appeals. Rule 19 reflects the concern that "[j]ust adjudication of claims requires that courts protect a party's right to be heard and to participate in adjudication of a claimed interest." *Shermoen* v. *United States*, 982 F.2d 1312, 1317 (9th Cir. 1992), cert. denied, 509 U.S. 903 (1993); see *Wichita & Affiliated Tribes* v. *Hodel*, 788 F.2d 765, 777 (D.C. Cir. 1986). That is true "even if the dispute is ultimately resolved to the detriment of that party." *Shermoen*, 982 F.2d at 1317. "Thus, the joinder rule is to be applied so as to preserve the right of parties to make known their interests and legal theories." *Ibid.* (internal quotation marks and citation omitted). That is particularly the case where, as here, the absent party has an interest in preserving its sovereign immunity and the attendant right not to have its legal duties judicially determined absent its consent. *Ibid.*; accord *Wichita & Affiliated Tribes*, 788 F.2d at 777. In recognition of those principles, apart from ensuring that an

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[3] In *Provident*, the Rule 19 issue was raised for the first time on appeal, after a judgment had already been entered by the district court. 390 U.S. at 109, 114-115.

[4] As the court of appeals recognized, "in some cases the interests of the absent person are so aligned with those of one or more parties that the absent person's interests are, as a practical matter, protected." Pet. App. 15a. In this case, however, the district court found that "[t]he BIA is not representing the Seminole Nation's interest in this lawsuit," and petitioners did not challenge that conclusion on appeal. *Ibid.*; see *id.* at 68a ("Unless the Tribe is a party to the lawsuit, it has no ability to protect its claimed interest in determining eligibility requirements.").

absent party's claimed interest is not frivolous, courts have refused to disregard an absent party's claimed interest based on the merits of a plaintiff's claim. *American Greyhound Racing* v. *Hull*, 305 F.3d 1015, 1024 (9th Cir. 2002); *Shermoen*, 982 F.2d at 1317; *Keweenaw Bay Indian Cmty.* v. *Michigan*, 11 F.3d 1341, 1347-1348 (6th Cir. 1993).[5]

2. Petitioners argue (Pet. 16-21) that the eligibility requirement tied to the 1823 date in the Indian Claims Commission's award is unlawful and that the Tribe's interest therefore is not legitimate or protected under Rule 19. That fact-specific issue does not warrant review.

As the court of appeals correctly explained, the relevant inquiry for purposes of Rule 19 is whether the Tribe's claimed interest is frivolous, not whether the interest ultimately has merit. Pet. App. 13a. Petitioners' argument is premised on a misidentification of the Tribe's interest. See Pet. 20 (arguing that "there is no right or interest which could be claimed by the absent Tribe to systematically exclude minority members of the Tribe"). As the court of appeals recognized, Pet. App. 6a; see *id.* at 33a, Congress left it to the Tribe to determine the eligibility requirements for participation in Judgment Fund programs by tribal members. The Tribe has adopted ordinances creating its Judgment Fund programs that contain an eligibility requirement that is tied to the 1823 date on which the Tribe as

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[5] Petitioners have not presented any question concerning the interaction of Rule 19 and the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, when a person seeks judicial review of agency action under that Act. Nor do petitioners rely upon or cite the APA in the certiorari petition. This case therefore presents no occasion to consider issues concerning the APA.

then constituted ceded its lands. A judgment in petitioners' favor would effectively change the Tribe's ordinances containing the eligibility requirement and require it to depart from that date of legal and historical significance to the Tribe. A judgment for petitioners would impede the Tribe's sovereign ability to determine eligibility requirements for participation in programs paid for out of a Judgment Fund established to redress a wrong to the Tribe as constituted in 1823.

Indeed, the challenged eligibility requirement tracks the language of the Indian Claims Commission's award itself, which was entered in favor of "the Seminole Nation as it existed in Florida on September 8, 1823," Pet. App. 30a, and which was the basis for establishing the Judgment Fund. In addition, the 1990 Distribution Act provides that "[a]ny plan for the use and distribution of the funds allocated to the Seminole Nation of Oklahoma shall provide that not less than 80 per centum thereof shall be set aside and programmed to serve common tribal needs, educational requirements, *and such other purposes as the circumstances of the Seminole Nation of Oklahoma may determine.*" *Id.* at 92a (emphasis added). The Tribe's interest in tying eligibility under programs funded by the Judgment Fund to the terms of the award cannot be dismissed as baseless.[6]

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[6] Petitioners contend (Pet. 16-21) that the district court's "findings"—statements in the "Historical Background" section of the court's opinion—demonstrate that the Tribe's interest is illegal and therefore not worthy of consideration. The court, however, made no finding that petitioners have a statutory right to share in the Judgment Fund. In fact, the court concluded that "the provisions of the Distribution Act did not directly address the Black Seminoles' entitlement to share in the tribal programs." Pet. App.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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33a. The court also stated that its order "does not reflect any findings by the Court as to the merits of [petitioners'] Judgment Fund Award claim." *Id.* at 50a.